

OECD Watch submission for the public consultation on updating the OECD Policy Framework for Investment 23 February 2015

1. Introduction

The OECD is currently in the process of updating its Policy Framework for Investment (PFI) to reflect developments in global economic trends and has requested input in the process from experts in the international investment community. The OECD has requested input from OECD Watch, and OECD Watch welcomes the opportunity to comment on the draft updates of the PFI chapters.

OECD Watch is an international network of civil society organizations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises. The following OECD Watch members contributed substantially to this submission: Centre for Research on Multinational Corporations (SOMO), Global Witness, Friends of the Earth Europe, Centre for Environmental Impact Analysis (CEIA, Ghana), and FERN. OECD Watch also fully supports the comments provided by IISD on the PFI update process in December 2014.¹ Our comments should be viewed as complementary and (in places) supplementary to IISD's submission.

Our comments are based on the following draft chapters:

- ◉ Investment Policy and Horizontal Policies and Practices (COM/DAF/INV/DCD/DAC/WD(2014)1/REV1)
- ◉ Responsible business conduct (RBC) (COM/DAF/INV/DCD/DAC/WD(2014)4/REV1)

The following two sections of this submission (sections 2 and 3) provide general comments on these two draft chapters primarily related to the PFI's underlying assumptions contained therein. In addition, we have also drawn on the specific expertise of several OECD Watch members on the issue widely known as "land grabbing"² and provided specific comments (in section 4) on how these two draft chapters could be adjusted to address the problem of land grabbing resulting from large-scale investments.

Principle overarching message of this submission

OECD Watch questions the usefulness of the current PFI draft, which currently suffers from a notably one-sided focus on the primacy of private investment, while in our view investment policy must be an instrument to meet wider goals of sustainable human development and the promotion and protection of human rights. We recommend that the OECD fundamentally revisit the principles underpinning the current investment regime. A redirection is required to ensure that investment policy serves not primarily the narrow interests of investors, but sustainable development and inclusive growth. First steps include: better safe-guarding of the state's right to regulate; active policies to avoid corporate capture of the policy agenda; narrower definitions and less ambiguous language in investment protection clauses; abandoning the one-sided and biased ISDS system; imposing binding obligations on investors; and enhancing investor accountability and enforcement of investor obligations.

¹ Available at <http://www.iisd.org/sites/default/files/publications/public-consultation-updating-policy-framework-for-investment-iisd-submission.pdf>

² See the 2011 Tirana Declaration "Securing land access for the poor in times of intensified natural resources competition" for a multi-stakeholder definition of land grabbing <http://www.landcoalition.org/fr/node/1109>.

2. General comments on the draft chapter on Investment Policy and Horizontal Policies and Practices

Lack of clarity/ambiguity regarding the overarching goals of investment policies

Paragraph 1 states that, “An effective investment policy is grounded in strong institutions and effective public governance. Investors expect government to develop and implement policies, laws and regulations in a reliable and fair manner.” In our view, it is crucial to first define what constitutes an “effective investment policy,” as this will lay the groundwork for all other chapters and recommendations of the PFI. Investment policy is an instrument to meet wider goals relating to sustainable human development and the promotion and protection of human rights. In this context, OECD Watch would like to call attention to the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD)³ and the CSO-driven Alternative Trade Mandate.⁴ Principle 1 of UNCTAD’s IPFSD states, “the overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.” The commentary further explains that the principle “recognizes the need to promote investment not only for economic growth as such, but for growth that benefits all, including the poorest. It also calls for the mainstreaming of sustainable development issues – i.e. development that meets the needs of the present without compromising the ability of future generations to meet theirs – in investment policymaking, both at the national and international levels.” OECD Watch would underline that the starting point for the PFI must be that human rights and sustainable development have primacy over commercial interests of corporations. States have an obligation to respect, protect and fulfil human rights. These obligations apply not only domestically but, in some cases, also extra-territorially.

An investment policy promoted by the OECD should not centre on the promotion and protection of investments, but on the promotion of sustainable investment and the state’s ability to fulfil its human rights obligations as laid down in core instruments and principles in international law.⁵ This should lay the foundation of the OECD’s PFI and should be explicitly reference in the Horizontal Policies and Practices. In our perspective, this will re-shift the focus of the framework from the assumption that more private investment is better *per se* to the quality of investment and how it relates to global social and environmental challenges and goals.

Policy space and the right to regulate for the public good

OECD Watch is of the opinion that the following paragraphs from the PFI are highly problematic:

- Para 1: “Firms need to know what the rules of the game are and require some assurance that those rules will not change once they have invested.”
- Para 7: “International trade and investment agreements can provide added transparency concerning the regulation of foreign investors in signatory countries. They can also provide policy

³ See: http://unctad.org/en/publicationslibrary/webdiaepcb2012d6_en.pdf

⁴ See: UNCTAD (2012), Policy Framework For Sustainable Investment http://unctad.org/en/publicationslibrary/webdiaepcb2012d6_en.pdf. The Alternative Trade Mandate Alliance is an alliance of 50 organisations developing an alternative vision of European trade policy that puts people and planet before big business. The Alternative Trade Mandate has been developed in extensive civil society consultations all over Europe. See ATM (2013) “Trade: time for a new vision” http://www.alternativetrademandate.org/wp-content/uploads/2014/02/Trade-time_for_a_new_vision-JAN14-PRINT.pdf.

⁵ For example, the UN Charter (Article 55) and the Universal Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

predictability by locking in current policies or providing a mutually agreed mechanism to handle policy change.”

Current social and environmental crises (e.g. widening national and international inequality; irreversible loss of biodiversity and climate change) demand a change of course in domestic and international economic governance. The suggestion that countries should avoid changing their regulatory frameworks to cater to the narrow interests of investors is disingenuous and disregards the fact that in healthy democracies rules and regulations are per definition political and subject to constant change. Instead of detracting from countries’ freedom to regulate, the PFI ought to emphasize this sovereign right. UNCTAD’s IPFSD includes a principle (no. 6) on the right to regulate as an expression of a country’s sovereignty. The principle advocates that countries maintain sufficient policy space to regulate for the public good. Guarantees for sufficient policy space to implement tailored development policies and goals, in particular, are crucial for developing countries. The kind of “stability” created by the current framework for trade and investment agreements that seeks to lock in current policies and levels of regulation is not in the interest of what should be the primary goal of such treaties, namely to further inclusive, sustainable growth. Countries worldwide are increasingly experiencing how trade and investment treaties restrict their sovereign right to regulate. The European Union, India, Indonesia, the United States amongst others are currently revisiting their trade and investment frameworks to seek ways to better safeguard their regulatory authority. The current text in the horizontal policies of PFI does not reflect this expanding international discussion.

Policy coherence for sustainable development

Paragraph 3 of this draft chapter notes that, “*Coherence is particularly important in regulation, which is one of the main pillars of an effective investment policy*” and “*‘whole-of-government’ approaches to policy design and delivery are becoming a common objective for many public administrations as a way to integrate cross-disciplinary perspectives into policy, improve co-ordination, and facilitate resource sharing and has to be accompanied by single windows facilitating the investor interface with government.*” OECD Watch agrees with firmly embedding policy coherence at the heart of the PFI. However, policy coherence in itself is not sufficient. Further explanation about the end goal of such an exercise is required. It bears reiterating once again that the underpinning principles should be sustainable development and inclusive growth. Investors may “increasingly expect public policies and services to be seamless and responsive to their needs”, but governments have a much wider social responsibility. International trade and investment agreements should be subject to periodic public and independent sustainability and human rights impact assessments. UNCTAD’s IPFSD principle 2 on policy coherence recognizes that investment is a means to an end, and that investment policy should be integrated in an overarching development strategy.

Countries should retain the option to revisit or terminate trade and investment agreements at any time, if these assessments show negative development impacts. The OECD might assist countries with periodically reviewing their business regulations at all levels to assess whether they are coherent with development commitments and protection of human rights, and adapt them where needed.

Democratic decision-making and avoiding corporate capture

Paragraph 5 reads: “*Transparency and engagement can deliver better policies with more stakeholder support. [...] Soliciting investor views, along with those of other stakeholders, when developing or revising policies contributes to policy legitimacy and effectiveness. Moreover, policy is more likely to be sound and not produce unintended side effects if it is formed in a structured and transparent way that gathers input from all interested parties.*” We agree with the statement that transparency and engagement can deliver better policies with more stakeholder support. However, in all policy areas, the real risk of privileged access to decision-making and corporate capture by business and industry lobby groups emerges as a fundamental flaw in (international) economic governance and policy-making. Policy-making should be firmly embedded in the democratic process, with decisions being

made by the people and their elected representatives, while every effort must be made to prevent privileged access and 'policy capture' of consultation and decision-making processes by industry lobby groups. The OECD PFI might assist countries in democratizing trade and investment policies by increasing the roles of parliament to help develop policies that prevent corporate capture.

Investment policy

Paragraph 8 epitomises the core flaws of the current draft, namely the one-sided focus on promotion and protection of investment and the interest of capital as opposed to wider public interest. It states that, "*Investment policy refers broadly to the set of policies shaping how investors are treated and their assets protected.*" And that *the overriding focus of investment policy remains the treatment of investors [...]. Investment policy should be consistent with national development plans and other strategies to ensure sustainable and inclusive development.*" This is the main premise on which rests the remainder of the chapter, with its focus throughout primarily on investor rights instead of on what is required to ensure a sustainable social and environmental investment policy.

It is currently by all standards undisputed that sustainable development, human rights and inclusive growth are fundamental elements of an investment policy which balances interests of a broad range of stakeholders in a holistic approach. We strongly urge the OECD to rethink what can only be qualified as a biased and outdated concept of investment policy.

Paragraph 9 reads: "*The way that investment policy is developed and amended is a key consideration of investment decisions. Investors will avoid or withdraw [emphasis added] from investment destinations where policies are modified at short notice, where governments do not consult with industry on proposed changes and where laws, regulations and procedures are not clear, readily available and predictable.*" OECD Watch feels strongly that this paragraph needs to be rewritten. Governments need full policy space to make new laws and regulations that consider the widest range of stakeholder interests in society. Policy-making per definition impacts segments of society, for better or worse. We reject any assumption that business should in any way be granted a privileged position in consultation processes. As stated previously, the OECD should instead work with governments to prevent corporate capture and increase the democratic legitimacy of economic policy-making.

Paragraphs 8 - 43 discuss current investment protection standards. In terms of our assessment, we refer to the input we provided for the FOI Round Table in 2014, which we shortly summarize here.

Current international investment rules, including those contained in most BITs, continue to be based on the premise that all investments are beneficial to development and that foreign investment will be attracted by means of rules and agreements that guarantee the protection of foreign investors. This approach insufficiently takes into account the potential adverse impact of foreign investors on societies, local communities, workers, consumers and the environment. The PFI's primary responsibility should be looking into how international investment and the rules governing it may contribute to inclusive and sustainable development.

A key problem in investment protection treaties is the expansive interpretation of clauses relating to the definitions of the investor/investment, (in)direct expropriation, fair and equitable treatment, etc. which have contributed to the exponential growth of investment dispute settlement cases over the past decades. The PFI should assist governments in amending the legal phrasing of investment treaty clauses to avoid unforeseen and undesirable interpretations of the protections granted and limiting the scope of ISDS. Investment agreements ought to be harnessed to build a fairer and more sustainable future for individuals, communities and our environment – not just to create profit for those with money to invest.

OECD Watch advises the OECD to promote a new framework for international investment that encompasses and builds on, amongst others, the UN Guiding Principles on Business and Human

Rights and the OECD Guidelines for Multinational Enterprises. In a fundamental recalibration of the system, such investor obligations should be made binding and enforceable. The policy space of states must be independently and unequivocally established and should take firm precedence over investor rights and privileges to ensure the unfettered ability of the state to regulate in the wider public interest.

ISDS must be abandoned as a high-risk and unnecessary parallel legal system which is beyond reform. Transnational corporations are perfectly able to assess the risks associated with their foreign investments and weigh them up against expected financial returns. In case of conflicts they can resort to national courts. In addition, private insurance is available to transnational investors to cover political risks. Instead of maintaining an ISDS system that allows for the transferal of the cost associated with expansively interpreted investment protections onto the taxpayer, this market-based solution should be the preferred option.

3. General comments on the draft chapter on Responsible Business Conduct

The current draft misses an important opportunity to include much more frequent and explicit references to the key OECD instrument in this area – the OECD Guidelines for Multinational Enterprises – which, along with other international human rights and environmental standards, equip governments and investors alike with the essentials for promoting equitable and sustainable growth.

The framing of RBC in the opening paragraph (1) posits RBC as being equally about the positive contribution that enterprises can make as well as avoiding adverse impacts. This is out of line with authoritative international instruments. According to the UNGPs, the OECD Guidelines, and the CSR strategy of the European Commission, the responsibility of an enterprise is determined by its adverse impacts. The paragraph should clearly state that RBC refers to the fact that companies have a responsibility to avoid and address their adverse impacts, including in their supply chain and other business relationships.

Paragraph 3 fails to acknowledge that States have a binding commitment to implement the OECD Guidelines and a duty to protect human rights, including when those human rights are abused by business enterprises. The paragraph's current framing of States' role as to "promote and enable" RBC simply as a way in which to attract investment is completely inadequate and misses the point entirely. This paragraph should remind States that they have binding international duties and obligations to protect human rights and ensure that the OECD Guidelines are implemented by companies operating within or from territory.

Paragraph 4 appears to apply an outdated and largely discredited definition of CSR as "going beyond the law". This should be revised to be consistent with authoritative instruments such as the OECD Guidelines, the UNGPs and the European Commission's CSR strategy. In addition, the final sentence of this paragraph should be deleted. The attempt to frame RBC as a positive business case risks giving the impression that RBC is only required of businesses if a positive business case is also present.

Under the section "A. Law making and enforcement", an additional paragraph should be added relating to the need for Governments to ensure that victims of corporate abuses have adequate access to justice and remedy through judicial and non-judicial grievance mechanisms.

4. Specific comments related to the issue of “land grabbing”⁶ resulting from large-scale investments in land

The global rush for land – driven by increasing demand for biofuel, food, raw materials and speculation – is wreaking havoc across the world; land is the ultimate finite resource. Since 2000, at least 31 million hectares of land, an area about the size of Germany, in developing countries have been leased to companies, or are under negotiation. Land grabbing frequently causes human rights violations; destroys local food security, livelihoods, forests and sensitive habitats; and further impoverishes some of the poorest and most powerless communities on earth, with particularly acute impacts on women. Even though the priority areas of concern for land grabbing are located in the global south, international entities are increasingly involved. For example, public companies, the financial institutions backing them, and the importers of commodities produced by such projects are fundamentally involved.

At the international level, initiatives have started to address the land-grabbing problem and the role of international financiers. In 2012, the UN Committee on World Food Security (CFS) endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGTs). The CFS subsequently adopted the Principles for Responsible Investment in Agriculture and Food Systems, however these were heavily criticised by civil society⁷ because they do not include a strong role for States in monitoring the Principles in an inclusive way.⁸

We would also urge OECD to make clear in the chapters on investment, as well as on a more general level, that it is crucial that States take responsibility to regulate both their companies as well as their financiers. OECD Guidelines for MNEs can give guidance and clarity to financiers as to what criteria they need to apply, but it should be States that are responsible for ensuring compliance and implementation. Along these lines, it is extremely important that the OECD revisit and revise the “Policy Framework on Investment in Agriculture” and other sectoral documents and instruments based on the PFI.

The need for increased corporate guidance on this has been recognised by the OECD itself, in the launching in 2013 of a process to develop guidelines for “Responsible business conduct along agricultural supply chains”.⁹ It is essential that the revisions to the OECD’s PFI are consistent with the guidance being developed in that proactive agenda project.

Specific comments on the issue of land grabbing in the draft chapter on Investment Policy Horizontal Policies and Practices

- Page 6 – Suggest adding the resource materials published under the Open Government Partnership¹⁰ to this list:

Investment Policy

With regard to the section on “Securing land tenure”, OECD Watch feels that the PFI’s approach to introducing western land tenure, registration, and land markets is misguided and that these practices

⁶ See the 2011 Tirana Declaration “Securing land access for the poor in times of intensified natural resources competition” for a multi-stakeholder definition of land grabbing <http://www.landcoalition.org/fr/node/1109>

⁷ See http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf

⁸ Further details available here: http://www.csm4cfs.org/files/Pagine/51/full_csm_raistmt_final_en.pdf

⁹ See <http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>

¹⁰ See <http://www.opengovguide.com/>

should not be promoted. Beyond this general comment, which would require a substantial re-write of the entire section, we have a number of specific comments and amendments:

- Paragraph 11: We suggest expanding this clause to recommend that an investment law should also clearly outline the rules that investors need to abide by when investing in that country. The mentioned protection guarantees should be given independent oversight (e.g. via parliamentarians) and be transparent to ensure that public interests are always put before private investors' interests;
- Paragraph 13: In the case of weak government enforcement of national laws it is important that there is an international binding set of rules and criteria that investors need to uphold when investing in that country. That set of criteria should clearly outline the rights but also the obligations of investors;
- Paragraph 14: ISDS is heavily criticised¹¹ by civil society as being an undemocratic and opaque sanction mechanism that gives precedence to investors' private interests over public interest;
- Paragraph 17: We are concerned by the inclusion of some of the restrictions that OECD has listed for foreign investors, such as the land ownership for business purposes, the local contact requirements, and government procurement favouring locally owned over foreign established companies. We think these requirements provide states with the necessary control they need to exercise power over foreign entities that sometimes have more capital and other resources available than the countries they invest in;
- Paragraph 19 – We would recommend including a sentence here which states that secure and well-defined land rights also ensure that local peoples land and other rights are protected from the potential negative impacts of investment;
- Paragraph 20 – We would recommend the following sentence is added after the second sentence of this paragraph to reflect the importance of collective and customary land and resource rights: “In the majority of the world land and resource rights are frequently managed under collective or customary tenure regimes, rather than private ownership”;
- Paragraph 21: We would recommend including the words: ‘for all stakeholders’ after the first sentence;
- Paragraph 23: Insert the word “customary” after “collective”;
- Paragraph 24: Add the words “indigenous peoples” after “ethnic minorities”;
- Paragraph 25: Add the words “and concentration of land holdings” after the word “speculation”;
- Paragraph 26: Amend the second sentence in the following ways (new text underlined): “At the same time, appropriate safeguards should protect existing legitimate tenure rights to ensure, for instance, that large-scale land acquisitions or investments do no harm, do not lead to the displacement, the loss of livelihoods, and more limited access to land or natural resources for the local population, and do not cause adverse environmental impacts.” Two new sentences should be added to this paragraph:
 - “Applying the principle of free, prior and informed consent as the basis for all consultations with communities potentially affected by large-scale land acquisitions or investments, is recommended as the most effective way of avoiding adverse impacts on land tenure security”, should be inserted after the second sentence;
 - “Access to grievance mechanisms and remedy should be made available to potentially affected communities”, should be inserted prior to the last sentence;

¹¹ See, for example, <http://www.foeeurope.org/how-taxpayers-footing-bill-europes-trade-deals-041214>

- Paragraph 27: After last sentence of this paragraph, the following should be added: ‘It should be recognised that securing land tenure for local communities is an important foundation for sustainable development and the avoidance of economically destabilising social conflict. In the past such conflicts have often been associated with serious human rights abuses. It is strongly in the interests of investors, States and communities that land rights, including customary rights, are respected and should be a priority for States to ensure that there is access to justice for local communities and individual land users through national judicial systems and international grievance mechanisms’.

Overall, the link between secure land tenure, land disputes and human rights violations is missing from this section. A new paragraph should be developed which explicitly recognises these linkages and makes recommendations to investors and governments on how to avoid human rights violations. We suggest text along the lines of the following: “Land disputes often lead to human rights violations of those who are protesting or whose land is being taken. It is important that victims of human rights abuses as a result of land disputes have access to justice to ensure they are able to get redress and to prevent impunity. Securing land tenure is an important step towards minimalizing the disputes over land, thereby reducing the chance of human right abuses.”

With regard to the section, *Protection of Property Rights* (paragraphs 32 and 33), we would suggest the principle of open contracting be recommended as a means to improve transparency, governance and accountability in relation to investments. Further resources can be found on the Open Contracting website.¹²

With regard to the section on *Expropriation* (paragraphs 34 and 35), given that we are increasingly seeing Governments (such as Laos PDR) attempt to introduce legislation allowing for expropriation for private purposes, we would recommend that this section explicitly states that expropriation for private or non-public purposes is not recommended and can lead to increase land tenure and property disputes.

In the section on “Key questions” (page 15), we suggest amending question 2 as follows: “How does the government ensure that the laws and regulations dealing with investment, their implementation and enforcement are consistent, clear, transparent, readily accessible, provide environmental and social safeguards and do not impose undue burdens?”

With regard to the questions specific to land tenure (page 15) we suggest amending these questions as follows:

- 9. What efforts have been undertaken to ensure that the land legislation adequately reflects all legitimate land tenure rights, is clear and easily accessible to land users and that land management is efficient and transparent? How are land rights allocated, administered and protected at national and sub-national levels?
- 10. What steps have been taken to improve land tenure security for domestic and foreign, large and small land users, recognising the different inequalities and vulnerabilities between them?
- 11. What proportion of land has been mapped and/or formally registered (by land category)? How long does it take and how much does it cost to register land?
- 12. Have land use plans been developed countrywide? What stakeholders are involved in negotiating them?

¹² See <http://www.open-contracting.org/>

- 13. What efforts have been made to support the development of a well-functioning land market while ensuring a fair and equitable access to land?
- 14. What are the institutions and the mechanisms in place to resolve land conflicts?
- 15. What measures have been taken to protect legitimate land tenure rights, including public, private, communal, collective, indigenous and customary rights?
- 16. What efforts have been put in place to develop and implement legislation to protect against land grabs and ensure that the negative environmental and social impacts of large-scale land acquisitions and investments are minimised.

With regard to the section on “Supplemental Questions” (page 17), we recommend adding a question about whether the government has implemented the principle of open contracting to Table 1.1.

With regard to Table 1.3 “Land Ownership and Registration” (page 20):

- Land tenure security – add a question about what legal requirements are placed on investors to recognise and protect local peoples formal and informal land and resource tenure rights;
- Responsible business conduct – the principle of free, prior and informed consent should replace the current weaker language around consultation (second bullet point); add a question about what legal and administrative measures are in place to ensure that investors comply with national laws and what steps are taken if these laws are not followed, or if the contractual terms of the investment agreement are broken.

With regard to Table 1.5 on Contract enforcement and dispute settlement (page 22):

- What steps are taken to ensure that both local communities as well as investors have equal access to the judicial system?

With regard to Table 1.6 Expropriation regime (page 24):

- Compensation for expropriation – add a question about how compensation to collectively owned land and resources is managed and the extent to which either non-cash, or trust-fund based compensations mechanisms are available, if those receiving the compensation so desire.

With regard to Table 1.7 Investment Treaty Policy (page 25):

- What steps are taken to ensure that investors do not have greater rights and access to the judicial system than local communities and other interested parties?

With regard to “Additional resources” (page 28):

- The UN-CFS Voluntary Guidelines on the Governance of Tenure, Forestry and Fisheries in the context of National Food Security¹³ need to be added to this list;
- Recommend also adding relevant human rights instruments – UNHRD, CESC, CEDAW, CBD and CCPR at a minimum;
- Open Contracting Principles¹⁴;
- Open Government resource materials¹⁵
- African Union Guidelines on large-scale land acquisitions.

Specific comments on the issue of land grabbing in the draft chapter on RBC

¹³ See FAO, <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.

¹⁴ See <http://www.open-contracting.org/>

¹⁵ See <http://www.opengovguide.com/>

Given the particular challenges for responsible business conduct being experienced in association with large-scale land acquisitions and investments, we would recommend that language linking these issues across the different chapters be included.

In Paragraph 3, we suggest adding the working “regulating” to the first sentence of Government responsibilities with regard to RBC.

In Paragraph 4, OECD Watch strongly supports the current language stating that business enterprises should comply with the national law, even if those laws are poorly enforced.

In Paragraphs 4 and 5, the descriptions of RBC in both paragraphs are missing the words “transparency” and “accountability”.

In Paragraph 8, the Voluntary Guidelines on the Governance of Tenure, Forestry and Fisheries in the context of National Food Security should be added here. The principle of “do no harm” should be added to this paragraph.

As a general comment on “A – Law-making and enforcement” (page 4), there is no language describing the enforcement section. The importance of Governments taking steps when enterprises do not comply with national laws and other standards set by government should be addressed within the revisions.

With regard to the “Supplemental questions” (page 7):

- Supporting business compliance – more details are required here on sanctions in the case of non-compliance;
- Promoting RBC abroad:
 - Add question on if the Government has completed, published and is implementing a National Action Plan, in accordance with the UNGPs;
 - Second bullet point should be “require business operating internationally” rather than “encourage business operating internationally”;
 - Fourth bullet point – add language on the content of corporate reporting requirements to include “land tenure associated risks”;
 - Add a new question about if the government has implemented anti-corruption or anti-bribery legislation for its enterprises operating overseas;
- Promoting international RBC principles
 - Add a new question “Does the Government require observance of international RBC principles (such as the OECD Guidelines for Multinational Enterprises and the Voluntary Guidelines on the Governance of Tenure, Forestry and Fisheries in the context of National Food Security) as a requirement for the receiving of public investment funding?”;
- Promoting transparency around RBC
 - Add a new question about if the government requires enterprises to report regularly and publicly on the implementation of any voluntary or regulatory environmental, social and governance policy commitments;
- Government practising RBC
 - Add a new question “Does the Government require observance of international RBC principles (such as the OECD Guidelines for Multinational Enterprises and the Voluntary Guidelines on the Governance of Tenure, Forestry and Fisheries in the context of National Food Security) as a requirement for the receiving of public investment funding?”.

With regard to “Resources” (page 9-10):

- Websites: We find it troubling that the websites of the OECD’s three primary stakeholders on RBC – BIAC, TUAC and OECD Watch – are not included in the list of relevant websites.

- Principles and Standards: Add the following:
 - The UN-CFS Voluntary Guidelines on the Governance of Tenure, Forestry and Fisheries in the context of National Food Security¹⁶
 - The UN-CFS Responsible Agricultural Investment Principles in the Context of National Food Security¹⁷ should be added
 - Open Contracting Principles¹⁸
 - Open Government resource materials¹⁹
- Tools, Guidance, Manuals:
 - Add reference to the OECD Guidelines guides produced by OECD Watch²⁰ and TUAC²¹. We are surprised that these would not already have been included in the draft.
 - Add reference to Oxfam's report "Banking on Shaky Ground".²²

In closing, we would like to reiterate our overarching concern that the current PFI framework unjustifiably prioritizes private investment, while in our view investment policy should be an instrument to meet wider goals of sustainable human development and the promotion and protection of human rights. The update of the PFI is an opportunity for the OECD to ensure that this is the case by revisiting the principles underpinning the current investment regime. The revised PFI should make it explicit that investment policy serves primarily sustainable development and inclusive growth.

Again, OECD Watch appreciates the opportunity to provide comments for the PFI update process, and we are happy to answer any questions about this submission.

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¹⁶ See <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

¹⁷ See http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/CFS_Principles_Oct_2014_EN.pdf

¹⁸ See <http://www.open-contracting.org/>

¹⁹ See <http://www.opengovguide.com/>

²⁰ See <http://oecdwatch.org/news-en/new-oecd-watch-guide-to-the-oecd-guidelines>

²¹ http://www.tuac.org/en/public/e-docs/00/00/0D/3D/document_doc.phtml

²² Oxfam, https://www.oxfam.org.au/wp-content/uploads/site-media/pdf/2014-47%20australia%27s%20big%204%20banks%20and%20land%20grabs_fa_web.pdf